

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)	
)	
DANIEL J. FEMIAK,)	CASE NO. 05-60272 JPK
)	Chapter 13
Debtor.)	

MEMORANDUM AND DECISION

This contested matter had its origin in a pre-hearing conference held on April 18, 2005. That conference in part concerned an objection to confirmation of the debtor's Chapter 13 plan which was filed by the United States of America, Internal Revenue Service, on April 5, 2005. At the April 18, 2005 conference, it was determined by the parties in attendance, including counsel for the debtor and counsel for the United States of America, that determination of issues relating to the objection in part depended upon resolution of the debtor's assertions concerning the amount of the claim of the United States of America, Internal Revenue Service, to be provided for by the plan. As stated in the Court's docket order entered on April 20, 2005, the Court ordered the debtor to initiate a proceeding under 11 U.S.C. § 505(a) with respect to the tax liabilities asserted against the debtor by the Internal Revenue Service. As consented to by counsel for the United States of America at the April 18, 2005 conference, this contest was to be initiated by a motion, rather than by the filing of an adversary proceeding. The debtor filed the motion initiating the matter under 11 U.S.C. § 505(a) on May 16, 2005. Paragraph 3 of that motion, which defines the parameters of the issues between the debtor and the United States of America, stated that "[t]he Debtor disputes the amounts owed for the 1997 taxes and believes that the Internal Revenue Service has misapplied funds and the claim should be substantially reduced". The motion's prayer for relief is generally that the Court determine the tax liability of the debtor to the United States of America, Internal Revenue Service. The debtor's request, as developed in this contested matter, implicates the correctness of penalties

asserted by the Internal Revenue Service with respect to "late filing" of the debtor's federal income tax return for the period ended 12/31/1995, and the amount of the debtor's liabilities for the period ended 12/31/1997.

Following a telephonic conference held on January 5, 2006, the Court entered a docket order on January 6, 2006 which states as follows:

Hearing held on 1/5/06 RE: . . . Objection filed by Internal Revenue Service to . . . Motion to Determine Tax Liability filed by Daniel J. Femiak. APPEARANCES: Atty. Schmidt on behalf of Debtor, Atty. Dorfman on behalf of IRS and Atty. Hoham on behalf of Trustee. Atty. Dorfman requests that debtor submit a written settlement offer of settlement [sic]. The Court concludes based upon the parties' recitation of the facts, that the debtor cannot direct the application of refund credits to any particular tax account; statements or agreements of a revenue office which compromise an assessed tax liability are not binding on the United States, IRS and that it is doubtful that the IRS is precluded from posting refund credits to a particular tax account when the assessed tax liability of that account is pending on appeal by the taxpayer. The foregoing is hereby reset for Telephonic Status Conference on 2/8/06 at 11:30 o'clock A.M.

Following a status conference held on February 8, 2006, the Court entered the following docket entry on February 9, 2006:

Hearing held on 2/8/06 RE: . . . Objection filed by Internal Revenue Service to . . . Motion to Determine Tax Liability filed by Daniel J. Femiak. APPEARANCES: Atty. Fisher on behalf of Debtor and Atty. Nat Dorfman on behalf of IRS. The debtor has filed adversary proceeding to determine extent and priority of liens on debtor's [sic] property, including priority of federal tax lien. The hearing is continued to allow parties to continue to attempt to liquidate IRS claim. The debtor disputes manner of application of refund credits, the issue remaining is whether the IRS can apply refund credits to a tax liability subject to an administrative appeal while the appeal is pending. The foregoing is hereby reset for Telephonic Conference on 4/19/06 at 10:45 A.M.

Following several more pre-hearing conferences, on July 28, 2006, the Court entered its Order Concerning Determination of Case on a Stipulated Record. This order provided that the parties

were to file a joint stipulation of facts by August 4, 2006, and that this stipulation would "constitute the sole and entire evidentiary record for the purposes of the Court's entry of final judgment in this case [contested matter]". The order also established a briefing schedule. Pursuant to the order, the parties filed a joint Stipulation of Facts – including 33 numbered documentary exhibits – on August 11, 2006. Each party filed an initial memorandum of law in accordance with the July 28, 2006 order; the United States of America filed its response to the debtor's initial memorandum pursuant to that order; the debtor elected to not file a response to the United States' initial memorandum.

The matter is now before the Court for determination.

The Court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a)/(b) and N.D.Ind.L.R. 200.1 of the Rules of the United States District Court for the Northern District of Indiana. This matter is a "core" proceeding under 28 U.S.C. § 157(b)(2)(B), (J), (L) and (O).

I. RECORD BEFORE THE COURT

The record for determination of this contested matter is comprised exclusively of the Stipulation of Facts filed on August 11, 2006, and the briefs of the respective parties – as directed by the Court's order entered on July 28, 2006.

II. ISSUES BEFORE THE COURT

As the recitation above demonstrates, the Court had tentatively determined in pre-hearing conferences that the sole issue remaining to be addressed by the parties was whether or not "the IRS can apply refund credits to a tax liability subject to an administrative appeal while the appeal is pending."; Docket Order entered on February 9, 2006. However, the determinations previously made by the Court in docket orders were not final determinations, and pursuant to Fed.R.Bankr.P. 7054 [applicable to contested matters pursuant to Fed.R.Civ.P.

9014(c)] and Fed.R.Civ.P. 54(b), any determination of the manner of those made by the docket orders under the circumstances of this case are not final determinations, and are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all of the parties". This Decision thus finalizes all issues raised by the parties in this contested matter.

The debtor's Memorandum in Support of Debtor's Motion to Determine Tax Liability presents two issues for determination by the Court:

1. Whether the debtor's Form 1040 federal income tax return for the period ended 12/31/1995 was timely filed; and
2. Whether under the circumstances of this case the Internal Revenue Service could apply overpayment credits derived from overpayment of federal income tax for tax periods subsequent to that ending 12/31/1995 in a manner other than that in which the debtor contends he directed those overpayments to be applied.¹

III. FACTS APPLICABLE TO THE ISSUES PRESENTED

All of the facts necessary for determination of this contested matter are before the Court in the Stipulation of Facts filed on August 11, 2006. The Court will incorporate into the subsequent section of this Decision those facts which it deems material to the determination of the issues presented by the parties.

IV. LEGAL ANALYSIS

A. Timely Filing of the 1995 Federal Income Tax Return

The debtor contends that his federal income tax return form the period ended 12/31/1995 was filed earlier than the date upon which filing is recorded on the records of the Internal Revenue Service. This issue has been raised by the debtor presumably to seek to

¹ These two issues are not parallel to those addressed throughout the course of telephonic proceedings which preceded the Court's July 28, 2006 order. However, these are the two issues which the debtor has chosen to place before the Court in this matter.

reduce the amount of the penalties imposed by the IRS for late-filing of the 1995 income tax return, thus presumably "freeing up" overpayment credits to apply to the 1997 income tax liabilities. The crux of the debtor's contentions with respect to this issue is that statements made by a purported employee of the Internal Revenue Service located in Cincinnati, Ohio to the debtor establish that the debtor's 1995 federal income tax return was in fact filed with the Internal Revenue Service prior to the date upon which the records of the Internal Revenue Service state that the tax return was filed with that entity. The principal assertions of the debtor in this regard are set forth in paragraph 5 of the Stipulation of Facts. The debtor points to circumstantial evidence – outlined in that paragraph of the Stipulation and referred to in subsection I of the "Argument" section of the debtor's Memorandum – to seek to establish that the Internal Revenue Service must have received a copy of the debtor's 1995 federal income tax return before the date upon which that return was officially posted as being received in the records of the Internal Revenue Service.

The Certificate of Official Record dated November 8, 2005 with respect to the debtor's federal income tax account for the period ended December 31, 1995, establishes that the records of the Internal Revenue Service state the date of the receipt of the 1995 return as June 6, 1997. The debtor relies on circumstantial evidence – essentially a purported conversation with a "Mr. Palmero", purported to have been an employee of some Internal Revenue Service office in Cincinnati, Ohio – to establish that the information provided by Mr. Palmero could not have been provided to the debtor unless the 1995 federal income tax return was sitting on Mr. Palmero's desk, and thus had been filed. The best that the record establishes is that the taxpayer contends that he had a telephone conversation sometime in February of 1997 with "Mr. Palmero" during which information was imparted to him which "Mr. Palmero" could not possibly have known if the 1995 federal income tax return was not before him somehow.

First, the lack of a specific date asserted by the debtor to have been the date of this telephone conversation; the lack of any contemporaneously recorded memorandum of this conversation; and the fact that the Internal Revenue Service has no record of this conversation – all undercut the debtor's circumstantial contentions. For all the record shows, and even assuming that a conversation with an Internal Revenue Service employee of the nature of that described by the debtor took place² – the information imparted by "Mr. Palmero" could have been based on nothing more than the debtor's statement to that individual that his 1995 federal income tax return disclosed a certain amount of tax liabilities and the debtor's statement that the return had been timely filed.

The principal problem with the debtor's assertions concerning the filing of his 1995 return in advance of the date recorded in the IRS' records is that there is no direct evidence of the date upon which the debtor contends the return was filed; in fact, no date is asserted by the debtor as the date of filing. The bottom line is that there is no evidence as to the date upon which the debtor asserts the 1995 return was filed. With respect to the filing of tax documents, "unless otherwise defined by statute, filing does not occur until the paper to be filed is delivered to, received and filed by the proper official", *Heard v. C.I.R.*, 269 F.2d 911, 913 (3rd Cir. 1959). More importantly, there is no evidence in this record by which the debtor has established the manner in which the return may have come into the hands of an employee of the Internal Revenue Service prior to the recorded date of receipt of the return. For example, there is no evidence: (1) of the date upon which the debtor contends the 1995 tax return was completed and signed by him; (2) that the debtor, or someone on his behalf, inserted a copy of his

² The Court does not mean to imply that perhaps this conversation did not take place. However, the Court must base its determinations upon the factual record submitted to it, and the lack of particularized information concerning this conversation causes the foundation for any factual conclusion concerning this conversation's existence to be unstable.

completed and signed 1995 federal income tax return into an envelope or other means of delivery, properly directed/addressed to the Internal Revenue Service at the proper office for filing of his return; (3) that he, or someone on his behalf, in fact deposited that mailing in the United States mail; (4) of the date upon which the asserted deposit of the mailed tax return was made in the United States mail. Admittedly, it is a relatively difficult task for a taxpayer to establish that he in fact mailed a federal tax return to the Internal Revenue Service, so that some form of the "mail box rule" is invoked, i.e., a presumption that items properly deposited in the United States mails are received by the recipient. However, this record totally fails to establish the basic foundation for the "mail box rule" – even if that rule applies – and the fact that there is no direct evidence by the debtor in this record of the manner in which, and date upon which, he transmitted his 1995 federal income tax return originally to the Internal Revenue Service fails to create any inference that the tax return was even transmitted to the Internal Revenue Service prior to the debtor's mailing of a copy of that return to "Mr. Palmero" on April 15, 1997 [Affidavit of Daniel J. Femiak, Exhibit 14 to the Stipulation of Facts]. Without deciding whether the "mailbox rule" has been affected by 26 U.S.C. §7502 [See, *Sorrentino v. Internal Revenue Service*, 383 F.3d 1187 (10th Cir. 2004)], the simple fact is that the debtor is seeking to overcome the presumed accuracy of the IRS' record of receipt of his return, and that the record fails to establish that the debtor did anything concerning attempted delivery of the return prior to April 15, 1997. Even with respect to this latter assertion, there is no specific evidence of the mechanics of the mailing sufficient to establish the predicate for the "mailbox rule"; See, e.g., *Rosengarten v. United States*, 181 F. Supp. 275 (Ct. Claims 1960); *Belser v. C.I.R.*, 10 T.C. 1031 (1948); *Sorrentino*, supra., or the predicate for application of 26 U.S.C. §7502(a)(1), i.e., there is no evidence of the nature of that required by 26 U.S.C. §7502(a)(2) or (c) in order to establish the "date of delivery" under 26 U.S.C. §7502(a)(1). As a result, the record fails to

establish that the debtor in fact filed his 1995 federal income tax return prior to the time that the filing of that return is recorded in Exhibit 4 to the parties' Stipulation of Facts: June 6, 1997.

Based upon the record made by the parties, the Court determines that the Form 1040 federal income tax return of Daniel J. Femiak for the period ended 12/31/1995 was filed on June 6, 1997. The result is that determinations of additions to tax made by the Internal Revenue Service based upon a filing date of June 6, 1997 are correct.

This determination moots issues addressed by the United States of America concerning equitable estoppel. The Court notes parenthetically that the United States Supreme Court explained in *Heckler v. Community Health Services of Crawford County, Inc., et al.*, 467 U.S. 51 (1984) – with respect to the manner in which the federal government could be estopped by actions of its employees – that the United States Supreme Court had never determined a case in which it would allow estoppel against the United States. *Heckler* is perhaps the last primary decision by the United States Supreme Court on this issue, and even under the guise of *dicta* as to elements which may "make a case" of estoppel against the United States, Federal Circuit Courts of Appeal which have potentially carved out exceptions to the "no estoppel against the United States" rule require the establishment of affirmative misconduct by a representative of the United States; *See, Kennedy v. United States*, 965 F.2d 413 (7th Cir. 1992). There is no evidence in this record of affirmative misconduct by any employee of the Internal Revenue Service, and thus to the extent that the debtor seeks to establish that the federal income tax return for 1995 was filed prior to June 6, 1997 by means of alleged representations made by this purported employee of the Internal Revenue Service, the debtor's case fails even under Circuit Courts of Appeals tests. Additionally, this Court is of the view that until the United States Supreme Court issues a decision which determines on the merits that estoppel against the United States of America based upon unauthorized representations of an employee of the

federal government states a cause of action or a defense, the Court deems pronouncements of Courts of Appeals to the extent that estoppel is a possible claim to be *dicta*.

The Court thus determines that the debtor's federal income tax return for the period ended 12/31/1995 was filed on June 6, 1997.

B. Application of Tax Refund Credits for Subsequent Years to the 1995 Federal Income Tax Liability

The debtor contends that certain overpayment credits arising from refunds claimed by the debtor/taxpayer on federal income tax returns for periods ending after December 31, 1995 should have been applied to other than the 1995 federal income tax liability – as the Internal Revenue Service chose to do.

The debtor's principal argument – and the sole argument in the debtor's submissions which cites or references a statute, a regulation, or the decision of a court – is based on 26 U.S.C. § 6330. The debtor appears to contend that his efforts to resolve his disputes with the Internal Revenue Service, memorialized in the record, invoked that section's prohibition against the continuation of "levy actions" while an appeal of the taxpayer's disputes with the Internal Revenue Service concerning taxes subject to levy was under review. This statute relates solely to actions concerning tax levies – the enforced collection of federal taxes provided by Title 26 of the United States Code. The record establishes that the Internal Revenue Service undertook no levy action against the debtor at any time. The debtor's argument in this context is entirely answered by the provisions of 26 U.S.C. § 6402(a), which provides in pertinent part that the Internal Revenue Service "may credit the amount of [any] overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment" [emphasis supplied]. The debtor's contention is that in federal income tax returns subsequent to those filed for the period ended 12/31/95, he requested application of those refunds to federal tax liabilities for years other than the period

ended 12/31/95. Pursuant to 26 U.S.C. § 6402(a), the Internal Revenue Service was entirely authorized to disregard this direction, and was entirely authorized to apply any overpayment credits arising from subsequent years' federal income tax returns to any liability which the Internal Revenue Service itself chose. As noted by the authorities cited by the United States on page 9 of its initial memorandum, the "voluntary payment rule" is not invoked by any direction of the taxpayer stated in a federal income tax return which claims an overpayment credit.

The Court determines that any designation of application of overpayment credits sought to be made by the debtor in any federal income tax return filed for a period after December 31, 1995 did not preclude the Internal Revenue Service from applying overpayment credits in the manner authorized by 26 U.S.C. § 6402.

Finally, even if the Court were to determine that the debtor's liability for the amount of his federal tax liability for the 1995 tax year was the subject of an appeal process before the Internal Revenue Service, the debtor has failed to cite to any legal authority for the proposition that the authority provided by 26 U.S.C. § 6402 to the Internal Revenue Service is suspended or superceded by the existence of an appeal concerning a prior year's tax liability as asserted by the Internal Revenue Service. There is a reason why the debtor does not cite any authority for this proposition: none exists.

V. DECISION

The Court determines that the debtor Daniel J. Femiak has failed to present any factual or legal issue under 11 U.S.C. § 505(a) which allows for redetermination of federal tax liabilities asserted against him by the United States of America, Internal Revenue Service.

IT IS ORDERED, ADJUDGED AND DECREED that the determinations made by the United States of America, Internal Revenue Service, with respect to the federal tax liabilities of Daniel J. Femiak for federal income tax, and interest and penalties, for the periods ended

12/31/1995 and 12/31/1997 are correct, including determination based upon the date of filing with the Internal Revenue Service of the debtor's federal income tax return for the period ended 12/31/1995 to have been June 6, 1997.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any application of payments of whatever nature made by the Internal Revenue Service to federal tax accounts of the debtor/taxpayer Daniel J. Femiak, as established by the record in this matter, are legally correct and valid.³

Dated at Hammond, Indiana on January 17, 2007.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor
Trustee, US Trustee
Attorney for Creditor

³ The Internal Revenue Service has filed an amended claim in this case which apparently includes adjustments made in part in accordance with Exhibit 33 attached to the Stipulation of Facts. This Decision does not adopt the assertions of that proof of claim as the federal tax liabilities to be provided for by the debtor in his plan submitted in this case. This matter has become more convoluted than a pure 11 U.S.C. §505(a) determination should be, due to the debtor's counsel's totally admirable – but sometimes exasperating -- trait of pushing the envelope to fully and completely represent the interests of her clients. The debtor has not challenged the administrative adjustments to his tax bill, only the bases upon which the Internal Revenue Service determined the tax liabilities prior to administrative adjustments. However, based upon the record, the Court assumes that the amended proof of claim filed by the Internal Revenue Service on May 3, 2006 accurately reflects this Decision. To the extent that it does not, the debtor is not foreclosed from filing an objection to that claim; however, any objection premised upon any issue involved in this Decision will be expected to comply with Fed.R.Bankr.P. 9011, and to not seek to present to the Court issues already determined by this Decision.